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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented is whether information lawfully obtained by federal law enforcement officials by means of electronic surveillance in connection with a criminal investigation and admitted in evidence in a resulting criminal prosecution was likewise admissible in evidence in this subsequent civil tax refund suit for wagering taxes which were assessed on the basis of such information.

The pertinent facts are as follows: In connection with an investigation of illegal wagering activities in Richmond County, Georgia, FBI agents obtained court authorization to intercept certain telephone conversations pursuant to the federal wiretap statute, 18 U.S.C. 2510 *et seq.* It is undisputed that the agents complied

with all statutory requirements in obtaining the authorization and carrying out the interceptions. The investigation resulted in the indictment of decedent Robert W. Best and others for operating an illegal gambling business. In September 1973, Best pleaded guilty to two counts of the indictment. At the time the court accepted the guilty pleas, testimony was given in open court with respect to the contents of the intercepted telephone conversations (Pet. App. A, p. 2a).

Prior to and after the guilty pleas, FBI agents transmitted information gained from the intercepted conversations to special agents of the Internal Revenue Service. The special agents in turn disclosed the information to revenue agents, who thereafter issued wagering excise tax assessments which Best paid in part (Pet. App. A, p. 2a).

Following Best's death, his executor instituted this action in the United States District Court for the Southern District of Georgia seeking a refund of the wagering excise taxes. The government counterclaimed for the unpaid balance of the assessed taxes. In support of the assessments, the government introduced evidence of the intercepted wire communications. Petitioner moved to suppress the wiretap evidence, contending that the disclosure of such evidence to revenue agents was unlawful under the federal wiretap statute. The district court denied the executor's motion to suppress and the court of appeals affirmed *per curiam* (Pet. App. A, pp. 1a-5a).

The court of appeals correctly upheld the admissibility of the lawfully obtained wiretap evidence in this civil tax refund suit. As it observed, the federal wiretap statute (18 U.S.C. 2517(2) and (3)) authorizes disclosure of wiretap

information to revenue agents,[1] and the suppression remedy provided in 18 U.S.C. 2515 encompasses only evidence obtained from illegal wiretaps and not information derived from duly authorized wiretaps.[2] Moreover, 18 U.S.C. 2517 (3) explicity authorizes lawfully intercepted wiretap evidence to be disclosed "in any proceeding," and the legislative history shows that that provision was intended to permit introduction of such evidence "in civil actions." H.R. Rep. No. 91-5149, 91st Cong., 2d Sess. 59-60 (1970).

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[1]An investigative or law enforcement officer who has lawfully obtained wiretap information may, under Section 2517(1), disclose such information to any other investigative or law enforcement officer "to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure," and, under Section 2517(2), may use such information "to the extent such use is appropriate to the proper performance of his official duties." While revenue agents (unlike special agents) of the Internal Revenue Service are not investigative or law enforcement officers within the meaning of Section 2510(7) (see Pet. App. A, p. 4a n. 4), disclosure of wiretap information by an investigative or law enforcement officer to revenue agents for civil tax assessment purpose is "appropriate to the proper performance of his official duties" under Section 2517(2) (Pet. App. A, p. 4a).

[2]Section 2515 provides for the exclusion of wiretap evidence "if the disclosure of that information would be in violation of this chapter." Disclosure of such information is unlawful only where the "information was obtained through the interception of a wire or oral communication in violation of [Section 2511(1)]." The suppression remedy of Section 2515 applies only to those situations described in Section 2518(10), *i.e.*, only where "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." See *United States* v. *Giordano*, 416 U.S. 505, 524-525; *United States* v. *Chavez*, 416 U.S. 562, 570-575; *United States* v. *Donovan*, No. 75-212, decided January 18, 1977. Contrary to petitioner's contention (Pet. 13), the decision below does not conflict with *United States* v. *Iannelli*, 477 F. 2d 999 (C.A. 3), affirmed on other grounds, 420 U.S. 770. There, the

However, the court did not find it necessary to base its decision on these grounds. Instead, it held that in any event the evidence in question was admissible because it was obtained as part of a bona fide criminal investigation and was already part of the public record in the prior criminal proceeding (Pet. App. A, p. 3a). This basis for the decision also was sound. Once evidence has been made part of the public record in a prior criminal prosecution, the defendant's privacy interest with respect to that evidence is substantially diminished if not wholly dissipated. Since the wiretap authorization statute does not require the exclusion of lawfully obtained evidence in a subsequent civil case, the evidence in this civil tax refund suit was properly admitted (Pet. App. A, p. 3a). Cf. *United States* v. *Janis*, 428 U.S. 433.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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court upheld criminal convictions based in part on evidence obtained through electronic surveillance, holding that the disclosure of the wiretap evidence to agents of the Internal Revenue Service was authorized under the wiretap statute, and that, in any event, the suppression remedy provided in the statute was available only in the event of an illegal interception.